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No. 08-453

In The Supreme Court of the United States

ANDREW M. CUOMO, in his official capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF ALL FORMER COMPTROLLERS OF THE CURRENCY SINCE 1973 AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF ALL FORMER COMPTROLLERS OF THE CURRENCY SINCE 1973 AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

James E. Smith, John G. Heimann, C. Todd Conover, Robert L. Clarke, Eugene A. Ludwig, and John D. Hawke, Jr. respectfully submit this brief as *amici curiae* in support of respondent.

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae James E. Smith, John G. Heimann, C. Todd Conover, Robert L. Clarke, Eugene A. Ludwig, and John D. Hawke, Jr. (the "*Amici*") each served as Comptroller of the Currency. Appointed by Presidents of both political parties, *Amici* collectively oversaw and directed the Office of the Comptroller of the Currency ("OCC") for more than 30 years, starting in July 1973 and ending in October 2004.

Each of the *Amici* thus has strong views about the outcome of this case, which involves the authority of the OCC to exercise plenary visitorial powers over national banks' banking activities – authority that

[1] The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Petitioner seeks to take upon himself with respect to national banks operating in the State of New York.

Respondents demonstrate why Petitioner cannot prevail under the text and structure of the National Banking Act and the history of the national banking system. *Amici* supplement that argument by showing that the OCC's exclusive supervisory and enforcement authority over national banks gives the OCC a unique ability to protect consumers in their dealings with national banks while also fulfilling Congress' objective that the national banking system be one "extending throughout the country, and independent, so far as powers conferred are concerned, of state [action that] * * * might impose limitations and restrictions as various and as numerous as the states." *Easton v. Iowa*, 188 U.S. 220, 229 (1903).

SUMMARY OF ARGUMENT

I.

One of the OCC's primary objectives is to ensure fair and equal access to financial services for all Americans. Through the exercise of its comprehensive visitorial powers, the OCC is uniquely equipped to achieve this objective effectively and efficiently.

There is a common misapprehension that the OCC's mission to ensure the safety and soundness of national banks is separate from – and paramount over – the OCC's mission to ensure national banks'

compliance with laws governing consumer protection. But the OCC considers its responsibility to ensure national bank compliance with consumer protection laws, including fair lending laws, an integral part of its obligation to ensure national banks' safety and soundness. The OCC uses the wide range of its supervisory powers in an ongoing effort to alert national banks of potential non-compliance that poses risks to consumers and to ensure that they are addressed as early as possible.

Because of its continuous supervision of national banks, the OCC is uniquely able to identify and mitigate such risks to the banks and those they serve. Experienced OCC examiners undertake examinations of all national banks every 12 to 18 months, and are constantly on-site at the largest national banks. Based on its examinations, the OCC assigns ratings to each national bank. These ratings have important consequences for national banks, including effecting their authority to conduct particular banking activities, and thus provide the OCC with great leverage in seeking changes in a national bank's policies or practices as part of the examination process.

The OCC requires national banks to have in place a system for rapidly and effectively responding to complaints from customers. The OCC also maintains its own system for receiving and responding to customer complaints. OCC examiners take into account customer complaint information when assigning national bank ratings.

The OCC has a wide range of both informal and formal enforcement tools at its disposal, including the power to require corrective national bank board resolutions or memoranda of understanding; issue notices of charges; impose cease-and-desist orders; hold hearings; assess, collect, and disburse monetary penalties; or order prejudgment attachments. *See* 12 U.S.C. § 1818(b)-(c), (h)-(i). Further, the OCC may require a national bank to "make restitution or provide reimbursement, indemnification, or guarantee against loss." *Id*. § 1818(b)(6)(A).

The threat of OCC enforcement actions, like the examination ratings assigned by the OCC, is a significant incentive for national banks to address any compliance issues *before* they become serious problems. The OCC's supervision of national banks is therefore prophylactic in nature, and is largely exercised without the need for enforcement proceedings. However, whenever such leverage is insufficient to achieve full compliance, OCC does not hesitate to take aggressive enforcement action against national banks.

II.

As this Court has recognized, essential to the national banking system is the *uniform* and *consistent* regulation of national banks throughout their individual nationwide operations. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11-14 (2007). Congress assigned the OCC the responsibility to

effectuate such regulation over national banks, and to ensure their compliance with all applicable law on a consistent basis *nationwide*.

Individual and potentially contradictory state enforcement proceedings against national banks would interfere with the nationwide protection of consumers that the OCC is uniquely able to provide. Such proceedings would subject national banks to potentially conflicting disciplinary directives, including injunctive orders, and divert state resources from problems outside the scope of federal regulation. States already have an enormous responsibility to enforce state law against state-regulated entities, such as those involved in predatory lending abuses – which the States themselves have recognized are largely confined to non-depository institutions in the subprime mortgage market. The rights and interests of consumers would be undermined if States could use their limited resources to impose additional layers of enforcement authority on national banks rather than concentrating those resources on state-regulated entities.

III.

Despite the absence of state authority to enforce laws with respect to national banks' banking activities, the States have a valuable role to play in identifying possible problems customers may encounter in dealing with national banks.

Recognizing this, the OCC has developed a variety of means to partner with the States. Through such partnerships, the OCC and the States share various types of information, which enhances the OCC's overall supervision of national banks. Thus, the States can and do meaningfully contribute to the OCC's fulfillment of its mission to ensure protection for consumers.

ARGUMENT

The National Bank Act, of which the grant of visitorial authority to the OCC, 12 U.S.C. § 484, is a core part, requires that the OCC comprehensively supervise all aspects of a national bank's operations, from the moment a national bank receives its charter and thereafter throughout its existence. Exclusivity of supervisory authority is critical to the effectiveness of the OCC's supervisory regime.

I. THE OCC'S EXCLUSIVE SUPERVISORY AUTHORITY OVER NATIONAL BANKS PROVIDES UNIQUE PROTECTION FOR THE NATIONAL BANKING SYSTEM AND THE RIGHTS AND INTERESTS OF CONSUMERS

One of the OCC's primary objectives is to ensure fair and equal access to financial services for all consumers. *About the OCC*, http://www.occ.treas.gov/aboutocc.htm. This objective is an integral part of the OCC's mission to ensure the safety and soundness of

the national banking system: "compliance [with consumer protection laws] is inseparable from safety and soundness." OCC, *Annual Report: Fiscal Year 2008*, at 27 (2009), *available at* http://www.occ.treas.gov/annrpt/1-2008AnnualReport.pdf [hereinafter "OCC 2008 Annual Report"].

As one of the *Amici* has testified, "direct supervision is a regulator's primary method for ensuring bank safety and soundness, which is crucial to maintaining stability in our nation's financial markets." *Current and Future Bank Examination and Supervision Systems: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 105th Cong. (1997) (prepared statement of Eugene A. Ludwig, Comptroller of the Currency), *available at* http://financialservices.house.gov/banking/10897occ.htm. The OCC alone is organized to ensure comprehensive and effective direct supervision of national banks, their operating subsidiaries, and their third-party service providers.

Such direct supervision provides the OCC with its unique capacity to ensure national bank compliance with applicable laws and regulations, including fair lending laws. *See* OCC 2008 Annual Report at 26-27. The comprehensive nature of the OCC's direct supervision ensures that consumers are offered maximum protection against unfair treatment in their access to and enjoyment of the products and services of national banks, thereby protecting consumers, for example, from the discriminatory

treatment addressed by the state law in the instant case.

The OCC's supervisory process has several key components, including educating national banks on their legal compliance and other responsibilities; regularly examining national banks and their operating subsidiaries and service providers; rating national banks based on examination findings; and acting, through both formal and informal enforcement mechanisms, to compel compliance by national banks with all applicable laws and regulations.

It is important to recognize that adherence to OCC supervisory directives is not "voluntary." Supervisors expect to be listened to and if behaviors requested by the supervisor are not promptly adhered to, adverse consequences follow. Because the OCC can employ a wide variety of supervisory and enforcement tools without resort to the courts, the threat of an OCC enforcement action is itself a formidable disciplinary mechanism. As the current Comptroller testified:

> [O]ur compliance regime is not enforcement-only. Instead, it is better described as supervision first, enforcement if necessary. With supervision addressing so many problems early that enforcement often is not necessary. For this reason, the number of formal enforcement actions taken by any bank supervisory agency is a misleading measure

> of the effectiveness of its consumer compliance regulation.

Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Financial Services, 110th Cong. 14 (2007) (statement of John C. Dugan, Comptroller of the Currency) [hereinafter "Dugan 2007 Testimony"].

A. The OCC Proactively Educates National Banks on Their Compliance Obligations

The OCC provides all national banks with extensive guidance regarding laws and regulations relevant to them. This guidance includes, among other things, legal staff interpretations, advisory letters, significant decisions on national bank applications, and a list of publicly released formal enforcement actions. The OCC also periodically issues bulletins to inform national banks and examiners about the OCC's or OCC-supported policies, guidelines, and pending regulatory changes. These materials are all publicly accessible through the OCC's website, as are recent court decisions relevant to national banks and OCC briefs.

With respect to consumer protection in particular, the OCC publishes the "Comptroller's Handbook for Consumer Compliance," a collection of manuals containing the OCC's current guidance and procedures for ensuring a national bank's

compliance with applicable consumer protection statutes and regulations.[2] And as specific, supplemental guidance on the practices needed to ensure compliance with fair lending laws, the OCC in April 2006 published a 147-page guide to "Fair Lending Examination Procedures."

The OCC also holds conferences and seminars focusing on consumer protection. For example, in 2008, the OCC hosted a two-day conference dedicated to fair lending. *See OCC Fair Lending Conference*, http://www.occ.treas.gov/flc_hp.htm. Together with the OCC's written guidance materials, such public forums serve to expand national banks' awareness and understanding of their legal obligations, and allow the OCC to obtain feedback from consumer advocacy groups and others that can inform the OCC's supervision of national banks. Through this

[2] *E.g.*, Federal Trade Commission Act, 15 U.S.C. §§ 41-58; the Truth in Lending Act, 15 U.S.C. §§ 1601-67f; the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639; the Fair Housing Act, 42 U.S.C. §§ 3601-19; the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-91f; the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-17; the Community Reinvestment Act, 12 U.S.C. §§ 2901-08; the Truth in Savings Act, 12 U.S.C. §§ 4301-13; the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-93r; the Expedited Funds Availability Act, 12 U.S.C. §§ 4001-10; the Flood Disaster Protection Act, 42 U.S.C. §§ 4001-128; the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-10; the Fair Housing Home Loan Data System, 12 C.F.R. § 27; the Credit Practices Rule, 16 C.F.R. § 444; the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-81(u); the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-92p; and applicable data privacy and security laws.

educational process, the OCC proactively engages national banks in early detection and correction of any practices or policies that could constitute or lead to violations of consumer protection laws or regulations, including those concerning fair lending.

B. The OCC Gathers Data Directly From National Banks And Consumers To Ensure That National Banks Are Adhering To Their Consumer Protection Obligations

1. The OCC Examines National Banks on an Ongoing Basis, Including By Maintaining Full-Time Resident Examiners at the Larger National Banks

A central component of the OCC's supervisory regime is the examination process. This process is pervasive and invasive. An entity may not obtain a national bank charter (including after holding a state charter) unless it can satisfy the stringent standards underlying such examinations, and it must live up to those standards throughout its existence as a national bank.

Moreover, the operating subsidiaries of national banks are also subject to the same extensive and comprehensive examination process as national banks themselves. *See* 12 U.S.C. § 24a(g)(3)(A); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 16-19 (2007). The same is true for service providers of national banks, which, with respect to the services

they perform on behalf of national banks, are "subject to regulation and examination by [the OCC] to the same extent as if such services were being performed by the depository institution itself on its own premises." 12 U.S.C. § 1867(c)(1). National banks may not, therefore, avoid strict OCC oversight by using operating subsidiaries or service providers as a means through which to conduct their permissible activities. All national bank activities, without regard to whether they are performed directly by a national bank, are subject to the OCC's comprehensive examination and enforcement authority.

The OCC's examination process includes monitoring national banks' activities, assessing risks, completing core assessments of national banks, and communicating with bank management and directors throughout the supervisory cycle, which ranges from 12 to 18 months, depending on a bank's condition and circumstances. *See* OCC, *Annual Report: Fiscal Year 2007*, at 37-38 (2008), *available at* http://www.occ.treas.gov/annrpt/2007AnnualReport.pdf [hereinafter "OCC 2007 Annual Report"].

The OCC employs more than 2,000 bank examiners to monitor banking activities for approximately 1,678 national banks in the United States. OCC 2008 Annual Report at *ii*. Approximately 1,400 examiners work full-time on community bank supervision. *Id.* at 12. Their work is coordinated through a national network of almost 50 field offices and 24 satellite offices that are located in virtually every State in the country, overseen by four district

offices in New York, Dallas, Chicago, and Denver. *Id.* For large and mid-size national banks, the OCC assigns teams of resident examiners. *Id*. And, at 17 of the largest national banks, the OCC maintains teams of resident examiners *permanently on site*, engaged in *daily supervision of all aspects of their operations*. *See id.* at 13. More than 460 examiners are deployed at these large banks full-time. *Id.*

Integral to the examination process is the OCC's scrutiny of national bank policies and procedures for compliance with consumer protection laws and regulations. "The OCC was the first federal banking agency to conduct regular, separate, full-scope consumer examinations, using specially-trained consumer examination specialists, and to produce consumer examination manuals and policy guidelines for bankers. That was in 1976." Julie L. Williams, Chief Counsel and First Senior Deputy Comptroller of the Currency, OCC, Remarks before the Consumer Federation of America 15th Annual Consumer Financial Services Conference 3 (Dec. 5, 2003), *available at* http://www.occ.treas.gov/ftp/release/2003-97a.pdf [hereinafter "Williams 2003 Remarks to CFA"].

The OCC has a cadre of more than 100 highly trained national bank examiners who dedicate their time specifically to consumer compliance examinations, consulting, and review. Working with dozens of attorneys and consumer complaint specialists, these examiners have plenary authority to investigate national bank activities and to

determine their compliance with consumer protection laws.

During each supervisory cycle, the OCC performs a fair lending risk assessment in each national bank to determine the bank's compliance with applicable fair lending laws and regulations and to assess the level of fair lending risk at the bank, including its mortgage subsidiaries. OCC 2007 Annual Report at 50. The fair lending risk assessment starts with the examiners' general knowledge about a bank based upon their past experience and records. Examiners seek to understand the bank's credit processes, look at the bank's history, and evaluate the bank's fair lending controls.

Based on its examinations of each national bank, the OCC assigns the bank three critical ratings. First, the national bank receives a composite rating under the Uniform Financial Institutions Rating System, or "CAMELS," integrating ratings of Capital adequacy, Asset quality, Management, Earnings, Liquidity, and Sensitivity to market risk. *Comptroller's Handbook: Bank Supervision Process*, at 11 (2007), *available at* http://www.occ.gov/handbook/banksup.pdf [hereinafter "Bank Supervision Process"]. CAMELS ratings range from the highest rating of 1, representing the least supervisory concern, to the lowest rating of 5, representing the greatest supervisory concern. *Id.* at 11-12. CAMELS ratings are formally communicated to a bank's board of

directors and management through a report of examination or other written communication.

Second, the OCC assigns each national bank a separate rating under the Uniform Interagency Consumer Compliance Rating System, used to measure the nature and extent of an institution's compliance with consumer protection laws. *Id.* at 89. These ratings are based on an evaluation of a bank's present compliance and the adequacy of its operating systems designed to ensure continuing compliance. Like CAMELS ratings, these compliance ratings are given on a scale of 1 through 5 in increasing order of supervisory concern. A national bank's Consumer Compliance rating is considered in determining the bank's CAMELS composite rating, and an adverse Consumer Compliance rating can result in a substantial downgrade in the CAMELS rating.

Third, the OCC reviews and rates each national bank's "record of meeting the credit needs of its entire community * * * consistent with the safe and sound operation of such institution," as required by the Community Reinvestment Act ("CRA"). 12 U.S.C. § 2903(a)(1); *see* 12 C.F.R. § 25.11(b). The OCC assigns a CRA rating to each national bank, and the rating is "adversely affected" by evidence of violation of fair lending laws, which may be uncovered during the OCC's compliance examination of the bank. 12 C.F.R. § 25.28(c)(1).

2. The OCC Uses Data Gathered Under the Home Mortgage Disclosure Act To Help Identify Possible Violations of Fair Lending Laws

As an integral part of the OCC's examination process, OCC economists and statistical experts are involved in reviews of statistical data, including data collected pursuant to the Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. §§ 2801-10. HMDA requires lending institutions to provide information that helps to show whether they are serving the housing credit needs of their neighborhoods and communities. Lenders must report loan data such as the types and amounts of loans made (or applied for); the disposition of loan applications, such as whether they were denied or resulted in an origination of a loan; loan prices; the property to which each loan relates (*e.g.*, single-family vs. multi-family) and its location (including the census tract); and the borrower's or applicant's ethnicity, race, sex, and income.

The OCC carefully reviews, scrutinizes, and analyzes HMDA data as part of its fair lending risk assessment process. As Comptroller Dugan has explained, however, while "HMDA data are a valuable starting point" for the OCC's rigorous analysis of discrimination and fair lending, "HMDA data alone are not enough, and can even be misleading unless interpreted carefully." John C. Dugan, Comptroller of the Currency, Remarks before the 2008 OCC Fair Lending Conference 4 (Sept. 10, 2008), *available at* http://www.occ.treas.gov/ftp/release/2008-103a.pdf. For

example, although HMDA data include some potentially relevant determinants of price, such as lien status, they exclude many other potential determinants, such as borrower credit history, borrower debt-to-income ratio, and the ratio of the loan amount to the value of the property securing the loan. Because "fairness and potential discrimination can't be assessed by comparing simple denial rates or average rate spreads across groups," a "valid assessment requires the hard work of applying more sophisticated methods from probability and statistics, so that relevant factors are considered in a rigorous and systematic way." *Id.* Thus, the OCC expands its fair lending reviews beyond HMDA data, probing a variety of pertinent data sources, including national banks' loan files.

The OCC's fair lending specialists scrutinize this additional information, such as loan-to-value ratios, credit scores, and debt service ratios, to do a more targeted, sophisticated, and comprehensive analysis of a lender's underwriting and pricing decisions than could be done based on HMDA data alone.

3. The OCC Collects and Acts on Consumer Complaints Against National Banks

The OCC requires national banks to have in place procedures to monitor and address consumer complaints. John C. Dugan, Comptroller of the Currency, Remarks before the Exchequer Club and

Women in Housing and Finance (Jan. 17, 2007), *available at* http://www.occ.treas.gov/ftp/release/2007-4a.pdf. But the OCC also obtains information directly from consumers regarding the activities of national banks. It uses this information both to resolve specific consumer complaints, including fair lending complaints, and proactively to identify and root out problems before they spread within the national banking system.

For more than three decades, during which time the *Amici* successively directed the OCC, the OCC has maintained a system that tracks consumer complaints. Developed in 1976, that system has evolved into the Customer Assistance Group ("CAG"), which is dedicated to the receipt and fair resolution of complaints from consumers regarding national bank practices. *See* Bank Supervision Process at 50; OCC, *Consumer Complaints and Assistance*, http://www.occ.treas.gov/customer.htm. The CAG, overseen since 1997 by the OCC's Office of the Ombudsman, plays an integral role in assisting OCC bank supervision in assessing compliance and reputation risks within the national banking system. *See* Bank Supervision Process at 50-51.

In 2008, the CAG received more than 90,000 telephone calls from customers of national banks and processed more than 41,000 written complaints. OCC 2008 Annual Report at 39. When a complaint is received by the CAG, it is assigned to a customer assistant specialist for evaluation within an average of five business days. Once assigned to a specialist,

the initial review must be completed within one business day. In many cases, the CAG staff can resolve consumer complaints over the phone. When a complaint cannot be resolved immediately, it is referred to OCC supervisory officials for investigation and appropriate action. Complaints are also sent directly to the national banks to which they pertain.

The CAG also uses the complaint data it collects for more general, forward-looking purposes. The CAG analyzes complaint data and disseminates them to OCC examiners, policymakers, and attorneys to be integrated into the bank supervisory process. *See* OCC 2007 Annual Report at 55-56. "Data derived from the CAG process plays an important role in identifying problems – at a particular bank or in a particular segment of the industry – that may warrant further investigation by examination teams, supervisory guidance to address emerging problems, or enforcement action." OCC, *2005-2006 Report of the Ombudsman* 26 (2007), *available at* http://www.occ.treas.gov/Ombudsman/2006OmbudsmanReport.pdf. OCC examiners are required to consider consumer complaint information when undertaking examinations and assessing a national bank's overall compliance risk and ratings.

The CAG also identifies complaint trends for particular products, such as home mortgages and credit cards. *Id.* Senior OCC officials review these trends when forging the OCC's supervisory strategies and developing new guidance on consumer compliance issues. *Id.* The CAG's management team also hosts

formal and informal meetings with banking associations, consumer advocacy groups, and state regulatory authorities to promote strong working relationships, to share best practices, and to strengthen risk identification measures. *Id.* at 27.

C. The OCC Has a Range of Supervisory Tools With Which To Ensure That National Banks Comply With All Applicable Consumer Protection Laws and Regulations

As noted, the OCC's supervision of national banks is designed to be prophylactic, but when prophylactic measures are not sufficient, the OCC takes enforcement action. National banks have tremendous incentives to accede to OCC's recommendations *before* such action is taken. Indeed, "[a]chieving voluntary compliance with laws, recommendations and agreements is often the rule rather than the exception. The [OCC's] potent alternative of formal enforcement proceedings usually insures such voluntary compliance: 'Recommendations by the agenc[y] concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings.'" *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 210, 218 (E.D.N.Y. 1979) (Weinstein, J.) (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 330 (1962)).

Due to the OCC's leverage over national banks, "when a bank examiner comes into a [national] bank

and says, 'I want you to fix something,' * * * by and large, they get very quick responses." *Oversight of the Office of the Comptroller of the Currency: Examination of Policies, Procedures and Resources: Hearing Before the H. Comm. on Financial Services*, 108th Cong. 46, 69 (2004) (testimony of John D. Hawke, Jr., Comptroller of the Currency) [hereinafter "2004 Oversight Hearing"]. As soon as any "problem or weaknesses are identified and communicated to the bank, the bank's senior management and board of directors are expected to promptly correct them." OCC, *Policies & Procedures Manual: Enforcement Action Policy*, PPM 5310-3 (rev) 3 (2001), *available at* http://www.occ.treas.gov/ftp/ppm/ppm-5310-3.pdf [hereinafter "Enforcement Action Policy"].

By exercising its confidential, powerful, supervisory leverage over national banks, the OCC can "fix problems before they become systemic," and "can get nationwide remedies if [it] find[s] systemic problems." 2004 Oversight Hearing at 73. Both the consequences of adverse examination ratings and the potent enforcement options available to the OCC demonstrate why national banks are so quick to respond to OCC corrective instructions without the OCC's resort to enforcement proceedings.

1. OCC Examination Ratings Have Highly Significant Consequences for National Banks

There are highly significant consequences of being subject to an adverse OCC determination resulting from a supervisory examination, including restrictions on the bank's activities. For example, a national bank that receives a CAMELS composite rating of 3 will face several restrictions. First, the bank will no longer be deemed an "eligible bank," 12 C.F.R. § 5.3(g), and thus will lose the benefit of expedited review by the OCC for filings, 12 C.F.R. § 5.13(a)(2), will require prior approval from the OCC before issuing or prepaying subordinated debt, 12 C.F.R. § 5.47(b), and will be unable to apply to the OCC to make certain loans, 12 C.F.R. §§ 32.7(a)-(b).

Second, a national bank that receives a composite rating of 3 will no longer be deemed a "well-managed" bank, 12 C.F.R. § 5.34(d)(3)(i), and thus will have to obtain prior approval before acquiring, establishing, or performing new activities in an operating subsidiary, 12 C.F.R. §§ 5.34(e)(5)(ii)(A), (e)(5)(iv), (e)(5)(vi); will be prohibited from controlling or holding an interest in a financial subsidiary, 12 C.F.R. § 5.39(g); and its parent bank holding company will not be able to engage in expanded "financial activities," such as insurance underwriting, securities underwriting, and merchant banking, as otherwise permitted under section 4(k) of the Bank Holding Company Act, 12 U.S.C. §§ 1843(k)(4), (l)(1). Third, the bank will face additional consequences, such as

a required surcharge on its semiannual assessment, 12 C.F.R. § 8.2(d), and may face more frequent on-site examinations, 12 C.F.R. § 4.6(b).

A national bank receiving a CAMELS rating of 4 or 5 will be subject to all of the aforementioned restrictions as well as additional adverse consequences, such as restrictions on its ability to appoint a new director or senior executive officer. 12 C.F.R. §§ 5.51(c)(6), (d)(1). Other rankings also trigger adverse consequences. For example, if a national bank receives less than a "satisfactory" CRA rating, the OCC can deny the bank's application to establish a branch office or to engage in a merger transaction. 12 C.F.R. § 25.29(a).

2. The OCC Has a Wide Range of Informal and Formal Enforcement Tools To Use Against National Banks

Under 12 U.S.C. § 1818, the OCC has power to ensure national banks' compliance with all applicable laws, rules, and regulations. The OCC has a wide variety of enforcement tools, both informal and formal, with which to achieve this goal.

The OCC's informal enforcement actions include, for example, requiring national bank board resolutions, memoranda of understanding, commitment letters, and other written documentation of a national bank's commitment to corrective measures to address safety and soundness and compliance concerns. Enforcement Action Policy at 4. Such actions often address issues

relating to compliance with consumer protection laws, such as disclosure of loan terms and avoidance of inappropriate lending practices. Informal enforcement actions provide a bank with "more explicit guidance and direction," and, by requiring a written commitment from the bank's board of directors, can serve as "evidence of the board's commitment to correct identified problems before they adversely affect the bank's performance or cause further decline in the bank's condition." *Id.*

Pursuant to federal statute, the OCC's informal enforcement actions are not made public. *See* 5 U.S.C. § 552(b)(8). Congress found it essential "to insur[e] the security of our financial institutions by making available *only* to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by[,] on behalf of, or for the use of such agencies." S. Rep. No. 813, 89th Cong. 45 (1965) (emphasis added). "If details of the bank examinations were made freely available to the public and to banking competitors, there was concern that banks would cooperate less than fully with federal authorities." *Consumers Union of United States, Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978) (citing *Hearing on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the S. Comm. on the Judiciary*, 88th Cong. 186 (1964)).

Thus, the fact that the OCC's informal enforcement actions are extraordinarily effective is generally unappreciated by commentators outside

the banking industry, and the efficacy of informal OCC actions is vastly underestimated. Indeed, for every formal enforcement action it has taken, the OCC has achieved dozens of corrective actions by national banks through informal enforcement actions. As the OCC's experience has demonstrated, "fixating on the use of 'formal' enforcement actions exalts form over substance" and, because it "verges on elevating publicity over effectiveness," it is counterproductive. Julie L. Williams, Acting Comptroller of the Currency, Remarks before the New York Bankers Association 4 (July 14, 2005), *available at* http://www.occ.treas.gov/ftp/release/2005-68a.pdf.

The OCC will, however, as necessary, use its formal enforcement tools, and the threat of such use is a major deterrent to aberrant behavior by national banks. The OCC may, for example, issue notices of charges; impose cease-and-desist orders; hold hearings; and assess, collect, and disburse penalties; or order prejudgment attachments. *See* 12 U.S.C. §§ 1818(b)-(c), (h)-(i). Cease and desist orders have been used to discipline all aspects of a national bank's operations. *See, e.g.*, *Groos Nat'l Bank v. OCC*, 573 F.2d 889 (5th Cir. 1978); *First Nat'l Bank of Eden v. OCC*, 568 F.2d 610 (8th Cir. 1978). Further, the OCC may require a national bank to "make restitution

or provide reimbursement, indemnification, or guarantee against loss." 12 U.S.C. § 1818(b)(6)(A).[3]

3. The OCC Has a Strong Record of Formal Enforcement Actions Directed Towards Consumer Protection

Many of the OCC's formal enforcement actions have been directed specifically towards consumer protection, including several that have involved significant restitution. In 2008, for example, the OCC ordered one of the largest national banks to make restitution to consumers harmed by the bank's relationship with telemarketers and third party processors.[4] In addition to estimated restitution possibly exceeding $125 million, the bank was required to contribute approximately $8.9 million to consumer education programs directed at the elderly and to pay a $10 million civil money penalty. And in a landmark 2000 case, the OCC required another national bank to cease unfair practices (including

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[3] In addition to these potential sanctions, a bank subject to a formal enforcement action by the OCC is deemed to be in "troubled condition," 12 C.F.R. § 5.51(c)(6), and will no longer qualify as an "eligible bank," 12 C.F.R. § 5.3(g) (and thus will lose significant privileges, as discussed *supra* with respect to CAMELS ratings).

[4] Amended Agreement, #2008-159 (Dec. 8, 2008), *available at* http://www.occ.treas.gov/FTP/EAs/ea2008-159.pdf. Because of the OCC's constant supervisory role, the OCC was able to monitor and revise the original mediated settlement with the bank, directing the bank to reimburse consumers directly.

failure to adequately disclose to consumers the significant limitations in a credit protection program it marketed) and pay consumers over $300 million in restitution.[5]

This landmark case was followed in the next year by five additional enforcement actions redressing unfair and deceptive practices at other national banks. While none of these latter actions imposed nearly as high financial sanctions, they ensured that the national banking system maintained best practices across-the-board.

In the fair lending context, the OCC has, in cooperation with the Attorney General of the United States and the Department of Housing and Urban Development ("HUD"), undertaken thousands of fair lending examinations and enforcement actions against national banks, some of which have included formal enforcement actions.[6] In 2005, for example, the OCC took formal enforcement action against a national bank and its subsidiary for unfair lending practices, requiring the bank to set aside at least $14 million to fund reimbursement payments to borrowers and strengthen its policies and control systems to ensure compliance with all applicable

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[5] Consent Order, #2000-53 (June 28, 2000), *available at* http://www.occ.treas.gov/ftp/release/2000-49b.pdf.

[6] *See, e.g.*, Eugene A. Ludwig, Comptroller of the Currency, On Continued Efforts To Promote Fair Lending and Community Reinvestment and Identifying and Eradicating Lending Discrimination (Aug. 5, 1997), *available at* 1997 WL 847864.

consumer protection laws, regulations and OCC guidance.[7]

In another case, the OCC undertook a fair lending examination that led to a settlement that included: (1) permanently enjoining a national bank from discriminating on the basis of race or national origin against any person in making available, or in the terms and conditions of, a mortgage loan; (2) requiring the bank to deposit $400,000 into a fund to compensate the aggrieved persons the Comptroller had identified; and (3) imposing a civil money penalty of $25,000.[8]

Even when they are imposed, monetary penalties and other sanctions do not signal the end of OCC compliance enforcement. When the OCC undertakes an enforcement action, it continues on-site assessment of the bank's compliance. A rating of satisfactory compliance can be achieved on a particular article of an enforcement action only after the bank has adopted, implemented, and adhered to all of the corrective actions set forth in the article, the

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[7] Agreement, #2005-142 (Nov. 2, 2005), *available at* http://www.occ.treas.gov/ftp/eas/ea2005-142.pdf.

[8] Consent Order, No. 99-13, 1999 WL 166598, at *1-*3 (Feb. 12, 1999); *see also* Settlement Agreement, Case No. 1:95 CV 2211 (N.D. Ohio 1995) (requiring national bank operating subsidiary to take remedial action as well as make compensatory payments to affected individuals based on possible violations of the Fair Housing Act and the Equal Credit Opportunity Act), *available at* http://www.usdoj.gov/crt/housing/documents/huntingtonsettle.php.

corrective actions have proven effective in addressing the bank's problems, and OCC examiners have verified through the examination process that this has been accomplished.

Data on outstanding enforcement actions, including information on enforcement action trends and broader problem-bank trend information, is included in the OCC's Problem Bank Report, which is distributed to OCC senior staff. Enforcement Action Policy at 16. This Report alerts the OCC staff to areas that examiners should probe at every national bank to root out possible systemic risk trends before they develop. The OCC also makes its enforcement information web-accessible to the public. In this way, OCC enforcement actions serve not solely to address a particular bank's past problems, but can be used by the OCC to anticipate and prevent future problems in other banks.

II. STATE ENFORCEMENT ACTIONS REGARDING NATIONAL BANKS' BANKING ACTIVITIES WOULD ADVERSELY INTERFERE WITH THE OCC'S SUPERVISORY PROCESS

Essential to an effective national banking system is the *uniform* and *consistent* supervision of national banks throughout their individual nationwide operations. Subjecting national banks' banking activities "to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business," contrary to the

National Bank Act. *Watters*, 550 U.S. at 13. It was specifically to prevent such interference that Congress vested the Comptroller, to the exclusion of the States, with visitorial authority over national banks. "Diverse and duplicative superintendence of national banks' engagement in the business of banking * * * is precisely what the [National Bank Act] was designed to prevent." *Id.* at 13-14 (citing *Easton*, 188 U.S. at 229).

The OCC's uniform, nationwide supervisory process has great advantages over state enforcement. By applying uniform standards, cognizant of the full range of issues pertinent to the operations of national banks, the OCC is uniquely able to determine what form of corrective action will best serve the national banking system and consumers throughout the United States. Moreover, because the OCC has unique authority to enforce efficiently *all* applicable laws against national banks on a *nationwide* basis, it can, in a single enforcement proceeding (formal or informal), obtain relief for consumers *throughout the United States*.

State attempts to enforce their disparate laws on national banks – attempts often motivated by varying policies and interests that are as diverse as the 50 States – would frustrate this uniform supervision regime. National banks would find themselves facing "a multiplicity of state and local restrictions and directives that would instruct them – in different ways – on how to conduct their business," and, thus, "face uncertainty about the standards applicable to

their business and their potential liability for a misstep." Letter from John D. Hawke, Jr., Comptroller of the Currency, to Paul S. Sarbanes, U.S. Senator (Dec. 9, 2003), *available at* http://www.occ.treas.gov/foia/SarbanesPreemptionletter.pdf.

For example, if States were able to take enforcement action against national banks, national banks would potentially be subject to injunctive orders obtained by state attorneys general that would require actions inconsistent with specific directives of the OCC. Such orders obtained in one State also could conflict with orders obtained in one or more other States. The particular enforcement approaches of each State, as well as each locality of every State, could be at odds with and seriously undermine the OCC's exercise of its discretion, from its unique vantage point as the regulator and supervisor of all national banks, to ensure nationwide, uniform consumer protection with respect to national bank activities.

Moreover, state enforcement efforts against national banks would undermine consumer protection efforts by diverting state resources from other problem sources, such as state-licensed subprime lenders and mortgage brokers. As Comptroller Dugan has explained to Congress:

> To those who argue that there should be both Federal and State supervision of national banks, that there can never be too many cops on the beat, I must respectfully disagree. We believe it is

> counterproductive for States to focus their finite enforcement resources on national banks that are already heavily regulated, especially when there are lightly regulated State entities, like many subprime lenders and mortgage brokers, that clearly have been the source of real problems. You can indeed have too many cops on the same beat if it means leaving other, more dangerous parts of the neighborhood unprotected.

Dugan 2007 Testimony at 15.

The States themselves have recognized that predatory lending abuses are largely confined to the subprime mortgage market and to non-depository institutions, which are not federally regulated. As explained by many of the state attorneys general, the key problems in this area involve "'state housing creditors – namely, non-bank finance companies – and not supervised depository institutions.'" *Review of the Nat'l Bank Preemption Rules: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 67 (2004) (quoting Brief for *Amicus Curiae* State Attorneys General, *Nat'l Home Equity Mortgage Ass'n v. OTS*, Civil Action No. 02-2506 (GK) at 10-12 (D.D.C. Mar. 21, 2003)).

Non-depository institution mortgage providers originated the vast majority of subprime mortgages from 2005 through 2007, accounting for a disproportionate percentage of defaults and foreclosures nationwide, with nearly one-half of the

mortgages they originated in some major markets now being in foreclosure. *Federal and State Enforcement of Financial Consumer and Investor Protection Laws: Hearing Before the H. Comm. on Financial Services*, 111th Cong. (2009) (statement of John C. Dugan, Comptroller of the Currency), *available at* www.house.gov/apps/list/hearing/financialsvcs_dem/occ_-_dugan031909.pdf.[9] This is largely due to the fact that "insured depository institutions, whether nationally- or state-chartered, are the most heavily regulated of all financial institutions, and they also tend to have the most conservative underwriting standards." *Subprime and Predatory Lending: New Regulatory Guidance, Current Market Conditions, and Effects on Regulated Financial Institutions: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 110th Cong. 18, 183 (2007) (prepared statement of Emory W. Rushton, Senior Deputy Comptroller and Chief National Bank Examiner, OCC). Thus, "nonbank lenders and brokers that originate these loans have captured the largest

[9] Examples of some of the most notorious contributors to the subprime crisis, all state-regulated mortgage lenders, include First Alliance Mortgage Company, *see Henry v. Lehman Commercial Paper, Inc.*, 471 F.3d 977 (9th Cir. 2006); Ameriquest Mortgage Company Multistate Settlement, *see* http://www.ameriquestmultistatesettlement.com/; and New Century Financial Corporation, *see* Final Report of Michael J. Missal, *In re New Century TRS Holdings Inc.*, Case No. 07-10416 (Bankr. D. Del. Feb. 29, 2008), *available at* http://pdfserver.amlaw.com/ca/newcentury01_0327.pdf.

share of the subprime market recently." *Id*. These lenders are – and always have been – subject to the oversight and enforcement jurisdiction of state officials.

Thus, States already have an enormous responsibility and burden to oversee and enforce state law against such state-regulated entities. The OCC's exclusive visitorial authority over national banks is no threat to the States' ability to fulfill that responsibility in a manner that will maximize protection for consumers. Quite to the contrary: "[p]rotection of consumers can be maximized if states and the OCC look for ways to spread their oversight to provide the most efficient, broadest coverage for consumers," *i.e.*, by respecting the OCC's exclusive enforcement authority over national banks. Williams 2003 Remarks to CFA, at 2.

Indeed, the OCC provided early and unmatched leadership on subprime lending. In 2001, the OCC and other federal agencies issued guidance intended to strengthen the examination and supervision of institutions with significant subprime lending programs. OCC Bulletin 2001-6, ("Expanded Guidance for Subprime Lending Programs"), (January 31, 2001), *available at* http://www.occ.treas.gov/ftp/release/2001-12a.pdf. Then, in 2003, the OCC issued an advisory letter to alert national banks and their operating subsidiaries to the risks that they could confront in dealing with subprime loans. OCC Advisory Letter 2003-3, "Avoiding Predatory and Abusive Lending Practices in Brokered and

Purchased Loans" (Feb. 21, 2003), *available at,* http://www.occ.treas.gov/ftp/advisory/2003-3.pdf. And to address emerging issues and questions related to certain subprime mortgage lending practices, in 2007, the OCC and the other federal financial regulatory agencies issued a Statement on Subprime Mortgage Lending, 72 Fed. Reg. 37,569 (July 10, 2007). As a result of these proactive OCC actions, the abuses in the subprime lending business – loan flipping, equity stripping, and making subprime loans that borrowers have no realistic prospect of repaying – have not sprouted and spread in the national banking system.

III. THE STATES HAVE A ROLE IN ASSISTING THE OCC WITH ITS ENFORCEMENT EFFORTS

Although Section 484 prohibits the States from enforcing against national banks any laws or regulations affecting the "business of banking," the OCC has reached out to the States to act as partners in ensuring that national banks comply with federal and state consumer protection laws, including fair lending laws. As the OCC has emphasized, "consumers benefit most when the OCC and the States focus on our respective areas of responsibility and find productive ways to cooperate." Dugan 2007 Testimony at 15. The OCC has worked to foster such cooperation through a variety of arrangements,

particularly with respect to sharing of information on consumer complaints.[10]

A. The OCC Has Entered Into Several Different Types Of Agreements With the States To Share Consumer Complaint Information

The OCC "encourages state officials to contact the OCC when they have information that would be relevant to the OCC in its supervision of national banks and their compliance with applicable laws." OCC Advisory Letter 2002-9, "Questions Concerning Applicability and Enforcement of State Laws: Contacts from State Officials," 1 (Nov. 25, 2002), *available at* http://www.occ.treas.gov/ftp/advisory/2002-9.doc.

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[10] The OCC not only seeks ways to cooperate with the States to ensure comprehensive and effective protection for consumers, but it also works closely with the other federal regulators to achieve this objective. As stated in a declaration of policy regarding fair lending issued jointly by the OCC, HUD, and other federal regulators, "the appropriate federal financial institutions regulatory agency will engage in ongoing consultations with DOJ or HUD regarding coordination of each agency's actions. The Agencies will coordinate their enforcement actions and make every effort to eliminate unnecessarily duplicative actions * * * The financial institutions regulatory agencies also will discuss referrals on a case-by-case basis with DOJ or HUD to determine whether multiple actions are necessary and appropriate." Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,274 (Apr. 15, 1994).

The OCC has solicited compliance-related information from the States for more than 20 years. In 1988, the OCC entered into an Agreement on Sharing of Confidential Supervisory Information with New York. Under this agreement, the OCC and New York agreed "to exchange confidential supervisory information, including Reports of Examination." In subsequent years, the OCC expanded its information-sharing efforts, particularly with respect to consumer complaints. In 1998, the OCC and the National Association of Insurance Commissioners drafted a model agreement to share consumer complaint information involving national bank insurance sales activities. The OCC now has in place insurance information-sharing agreements with all 50 States, the District of Columbia, and Puerto Rico.

The OCC also has adopted broader means to receive referrals of consumer complaints regarding national banks from state attorneys general and state banking departments. The OCC has signed Memoranda of Understanding ("MOUs") providing for complaint referrals with the banking regulators of 45 States and Puerto Rico. *See*, *e.g.*, OCC 2008 Annual Report at 28-29 (discussing statistics through August 2008).

Under the most recent model MOU, developed in 2006 by the OCC and the Conference of State Bank Supervisors, if a State receives a complaint that pertains to a national bank, it will promptly share the complaint with the OCC and can monitor how it is

resolved. The first State to translate the model memorandum into an actual MOU with the OCC was New York, which did so in 2006. John C. Dugan, Comptroller of the Currency, Remarks before the Exchequer Club and Women in Housing and Finance (Jan. 17, 2007), *available at* http://www.occ.treas.gov/ftp/release/2007-4a.pdf.

The OCC recognizes that information-sharing with the States holds "real benefits for consumers." John C. Dugan, Comptroller of the Currency, Remarks before the Interagency Consumer Complaint Conference 7 (Oct. 15, 2007), *available at* http://www.occ.treas.gov/ftp/release/2007-111a.pdf. So the OCC has improved upon the model MOU procedures by introducing a web-based system, Complaint Referral Express, in 2008. This system further facilitates the exchange of customer complaint information between the OCC and state agencies.

B. The OCC Requires National Banks To Respond Properly To State Concerns

The OCC also ensures that national banks respond promptly and properly to complaints they receive directly from States. The OCC requires national banks "to resolve consumer complaints fairly and expeditiously, regardless of the source of the complaint – whether received directly from a consumer, referred from the OCC's CAG, or received from a state agency or official, or from any other source." OCC Advisory Letter 2004-2, "Consumer

Complaints Referred to National Banks From State Officials," 2 (Feb. 26, 2004), *available at* http://www.occ.gov/ftp/advisory/2004-2.doc. In particular, the OCC has instructed national banks that they "should not assert the OCC's exclusive visitorial authority as justification for not addressing customer complaints that are referred by state officials." *Id.*

Where complaints allege that national banks are engaging in any illegal, predatory, unfair or deceptive practices, the OCC encourages the States to bring complaints directly to the OCC so that the OCC may take appropriate action. In the case of a customer grievance, state officials are encouraged to send the complaint to the CAG. In the case of broader issues, such as the applicability of a particular state law to national banks generally, or where a state official has information that an individual national bank is engaged in a particular practice affecting multiple consumers that is alleged to be predatory, unfair or deceptive, the OCC asks the States to contact the OCC Chief Counsel's Office. State referrals regarding such issues have led to OCC investigations resulting in cessation of certain practices and civil money penalties.

C. The OCC Is Pursuing Other Methods To Collaborate With the States on Its Enforcement Efforts

The OCC and the States are experimenting with a number of other methods of collaborative

enforcement. One notable success has been in the area of community reinvestment laws. When the OCC is scheduled to conduct CRA examinations of national banks, it contacts local banking commissioners and solicits input regarding the banks' records of performance under applicable state community reinvestment laws. This enhances the OCC's ability to assess accurately each bank's federal CRA performance.

The OCC also works with state officials to ensure consistent enforcement against related entities. For example, as discussed *supra*, in 2000 the OCC entered into a landmark settlement with a large national bank that directed the bank to cease a number of unfair and deceptive practices and to pay at least $300 million to consumers harmed by those practices. At the same time, the San Francisco District Attorney entered into a similar agreement with the bank's parent company. These settlements culminated years-long collaborative investigations by the two agencies into violations of the Federal Trade Commission Act, the Federal Deposit Insurance Act, the California Business and Professions Code, and the Fair Credit Reporting Act.

In 2003, the OCC issued an order requiring another national bank to dissolve, following an OCC enforcement action freezing the assets of the bank's controlling shareholder and placing restrictions on the assets of the bank. These actions were the result of a coordinated investigation by the OCC, the New York Attorney General, the Securities and Exchange

Commission, and the Department of Labor, after New York uncovered a late-day trading scheme involving a New York investment management firm. As a result of the cooperation, not only were the illegal and abusive practices halted, but the investment management firm's financial resources were made available so that the national bank could unwind its affairs without undue disruption to its clients.

The OCC is continuing to work on innovative means to coordinate with the States to achieve shared objectives. For example, a pilot project in development with New York and Massachusetts will address instances in which national banks work with independent mortgage brokers. Through parallel examinations of a sample of national banks by the OCC, and examinations of a sample of state-licensed mortgage brokers by each State, the OCC and the States hope to develop a baseline of useful compliance information resulting from this unique congruence of state and federal jurisdictional interests. *See* Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, Remarks before the New York Bankers Ass'n 6 (July 11, 2007), *available at* http://www.occ.treas.gov/ftp/release/2007-72a.pdf.

The OCC's outreach to and cooperation with the States is further confirmation that the exclusivity of the OCC's visitorial powers over national banks strengthens, and in no way undermines, consumer protection throughout the United States.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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